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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/502,082	07/22/2004	Nils Cornelis Sips	7393/8-4061	8981
43798 7590 06/21/2010 FITCH, EVEN, TABIN & FLANNERY P. O. BOX 18415 WASHINGTON, DC 20036				
EXAMINER STULIL, VERA				
ART UNIT		PAPER NUMBER		
1781				
MAIL DATE		DELIVERY MODE		
06/21/2010		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/502,082

Applicant(s)

SIPS ET AL.

Examiner

VERA STULII

Art Unit

1781

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 18 May 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-7, 9, 16-18 and 21-25.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attached.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Vera Stulii/
Examiner, Art Unit 1781

Continuation of (3).

NOTE: no listing of claims has been submitted in the Amendment after Final.

Continuation of 11:

Applicants' comments submitted 05/18/2010 have been considered, but are not deemed persuasive for the reasons of record as stated in the Non-Final Office action mailed 07/11/2008 (pages 2-6) and Final Office action mailed 02/18/2010 (pages 2-6).

In response to Applicants' arguments against the references individually, that Kettlitz does not teach or disclose UHT-treated food product (page 2 of the Reply), it is noted that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). As stated in the Office action mailed July 11, 2008 and in the Final Office action mailed 02/18/2010, Kettlitz '894 disclose the same starches as claimed by Applicants. Kettlitz et al disclose that highly swollen (viscous) cooking stable starches are used in many different applications, for example in the preparation of soups, sauces, meat products, dressings, micro-wavable food and in the preparation of bakery creams and fillings, in convenience foods that need to have a high viscosity and smooth texture after heating (to 80-100°C) (Col. 1 lines 46-50). Kettlitz et al disclose that stabilized high viscosity starches are particularly suitable for the mentioned applications (Col. 1 lines 51-53). Kettlitz et al disclose stabilized starch n-alkenyl succinate (Col. 2 lines 55-56) and stabilized starch n-octenyl succinate (Col. 2 lines 56-57). Kettlitz et al disclose soups, sauces, meat products, dressings, micro-wavable food, bakery creams and fillings (Col. 1 lines 46-50). Kettlitz et al do not specifically disclose UHT treatment of the food products. However, Kettlitz et al disclose use of stabilized starch n-alkenyl succinate in the food products that normally undergo UHT/high-temperature/sterilization/ pasteurization treatment. Daenzer-Alloncle et al disclose a lactic cream which has been treated by an ultra-high temperature ("UHT") treatment or other sterilization procedure or by pasteurization to provide a cream product for unrefrigerated storage and which contains between 1.5 and 4% by weight of modified starch for controlling viscosity, so that the composition has a viscosity between 250 and 1600 mPas (Abstract). Since Daenzer-Alloncle et al disclose use of modified starch as a viscosity component in a cream product that undergoes heat treatment, and Kettlitz et al disclose use of heat stable high viscosity starches in preparation of cream products, one of ordinary skill in the art would have been motivated to employ heat stable high viscosity starches in preparation of cream products as taught by Daenzer-Alloncle et al. One of ordinary skill in the art would have been motivated to do so, since both Kettlitz et al and Daenzer-Alloncle et al. disclose use of modified starch as a viscosity component; foods that undergo UHT/high-temperature/sterilization/ pasteurization treatment; and the importance of heat stability of starches.

In response to Applicants' arguments regarding the viscosities (pages 3-4 of the Reply), it is noted that regarding particular viscosity recitations after re-heating in claims 1, 2, 5, 7 and 21, 23-24, although the references do not specifically disclose every possible quantification or characteristic of its product, such as viscosity after re-heating, this characteristic would have been expected to be in the claimed range absent any clear and convincing evidence and/or arguments to the contrary (see also arguments regarding particular viscosity on page 8 of the Reply). The combination of references disclose the same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of the ordinary skill in the art would recognize that the viscosity after re-heating, among many other characteristics of the product obtained by referenced method, would have been an inherent result of the process disclosed therein. The Patent Office does not possess the facilities to make and test the referenced method and product obtain by such method, and as reasonable reading of the teachings of the references has been applied to establish the case of obviousness, the burden thus shifts to applicant to demonstrate otherwise.

On page 6 of the Reply Applicants state that Kettlitz would not have been combined with Daenzer-Alloncle because a fluid lactic cream product is not even meant to be reheated. In response to this argument, it is noted that Daenzer-Alloncle et al is relied upon as a teaching of use of modified starch as a viscosity controlling component in a cream product that undergoes ultra-high temperature ("UHT") treatment. Product as disclosed by Kettlitz (soups, sauces, meat products, dressings, micro-wavable foods, bakery creams and fillings) were well known to be reheated again before consumption. Therefore, the change in the viscosity after re-heating is the inherent result of the use of the starch n-alkenyl succinate as texturizing agents in these products absent any clear and convincing evidence and/or arguments to the contrary.